BUMI SARAWAK ENTERPRISE & ANOR *a*

v.

SIBU RURAL DISTRICT COUNCIL

HIGH COURT SABAH & SARAWAK, SIBU *b*
TEE AH SING J
[CIVIL APPEAL NO: 20-12-7 OF 1997]
3 AUGUST 1998

CIVIL PROCEDURE: *Parties - Striking out of - On the basis that 2nd plaintiff could not sue in firm's name being a sole proprietorship - Whether trial judge should not have considered this issue as it was not mentioned in statement of defence - Whether trial judge should have exercised discretion and allowed a change of name - Whether defendant had waived this irregularity - Whether defendant was estopped from raising issue of sole proprietorship* *c* *d*

CONTRACT: *Claim for work done - Whether 2nd plaintiff was a nominated sub-contractor under agreement between 1st plaintiff and defendant - Whether 2nd plaintiff had a right to commence action*

The plaintiffs appealed against the decision of the learned Sessions judge who had ordered that the 2nd plaintiff be struck out as party to this action on the basis that the 2nd plaintiff a sole proprietorship, could not sue in its firm's name. *e*

The issues for consideration were: (1) whether the Sessions judge should not have considered the issue of sole proprietorship as it was not mentioned in the statement of defence; (2) whether in view of *Mohamed Mustafa v. Syed Ahmad*, the Sessions judge should have exercised her discretion to allow an amendment in respect of the name of the 2nd plaintiff; (3) whether the defendant had waived this irregularity as the defence had already been filed and the pleadings closed; (4) whether the defendant was estopped from raising the issue of sole proprietorship; (5) whether the 2nd plaintiff was a nominated sub-contractor under the agreement ('the agreement') between the 1st plaintiff and the defendant and thus, a party to the action; and (6) whether the statement of claim was based on the agreement, as in addition to the contract sum under the agreement, there was a further claim for moneys for work done and material supplied to the defendant by the 2nd plaintiff. *f* *g* *h*

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Held:

[1] The issue that the 2nd plaintiff being a sole proprietorship is not a legal persona, is a point of law. That being the case, it was not mandatory to mention it in the statement of defence. It was also not necessary to state it in the said application. Under the SCR, a pleading must state the facts and not the law.

[2] In *Mohamed Mustafa v. Syed Ahmad*, there was an application for amendment and the Federal Court held that the trial judge was right in allowing the amendment. However, in this case, as there was no formal application to amend the name of the 2nd plaintiff, there was no material for the Sessions judge to decide whether to exercise the discretion to allow the amendment. In the absence of any such application, the Sessions judge did not err in not allowing the name of the 2nd plaintiff to be changed.

[3] The "reasonable time" in O. 2 r. 2(1) of the SCR means a reasonable time after becoming aware of the irregularity. The evidence that the 2nd plaintiff was a sole proprietorship only surfaced after the pleadings had been closed. Therefore, the fact that the defence had been filed or the fact that the pleadings had been closed were not relevant as those had occurred before the irregularity became apparent. This court was of the view that the defendant had taken objection in respect of the irregular proceedings within a reasonable time and as such, the defendant had not waived the irregularity.

[3a] Order 10 r. 1 of the SCR states that two or more persons claiming to be partners in a business in respect of a cause of action may sue or be sued in the name of the firm. However, a person trading by himself as a firm must sue in his own name though he may be sued in his trading name. Accordingly, the defendant was not estopped from raising the issue that the 2nd plaintiff, being a sole proprietor, could not sue in the name of the firm.

[4] The 2nd plaintiff did not adduce any evidence to show that a written consent of the engineer had been obtained pursuant to cl. 20 of the agreement for the 1st plaintiff to assign the contract or sublet any portion of the works to the 2nd plaintiff. Also, no evidence was adduced to show that he was a duly nominated sub-contractor under the agreement.

[5] It was clear that para. 5 of the statement of claim was based on the agreement. Further, no evidence was adduced that the defendant had requested RM10,000 from the 2nd plaintiff for works done and material supplied. In addition, as the 2nd plaintiff had not proved that there was assignment, it had no right to commence this action.

[6] In light of the above, it was clear that the 2nd plaintiff was not a party to the contract. The Sessions judge had not erred in striking out the 2nd plaintiff as a party in this action on the ground that it was not a party to the contract.

[Appeal dismissed.]

Cases referred to:
Alagappa Chettiar v. Coliseum Cafe [1962] 28 MLJ 113 ***(refd)***
Madan Lal & Anor v. Ho Siew Bee [1982] MLJ 105 ***(refd)***
Mohamed Mustafa v. Syed Ahmad [1972] 2 MLJ 241 ***(dist)***
Mason v. Mogridge [1891-92] 8 TLR 805 ***(refd)***
North-Western Salt Co Ltd v. Electrolytic Alkali Co Ltd [1913] 3 KB 422 ***(refd)***
United General Insurance Co Sdn Bhd v. Progress Credit Sdn Bhd [1988] 2 MLJ 297 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 91, 92, 101, 102, 103, 104
Interpretation Acts 1948 & 1967, s. 3
Rules of the High Court 1980, O. 12 r. 6
Subordinate Courts Rules 1980, O. 2, O. 2 r. 2(1), O. 10, O. 10 r. 1, O. 14 r. 14

Other sources referred to:
16 Halsbury's Laws of England, 4th edn, para 1515
Malaysian Court Practice Subordinate Court, p 454, para 14.13.2
Mallal's Supreme Court Practice, 2nd edn, p 1078, para 77/1/6

For the plaintiffs - Belinda Hii; M/s Hii & Hii Advoc
For the defendant - George Lim; M/s Battenberg & Talma Advoc

Reported by Usha Thiagarajah

JUDGMENT

Tee Ah Sing J:

This is an appeal by the plaintiffs/appellants against the decision of learned Sessions Court judge made on 14 July 1997 whereby the learned Sessions Court judge allowed the defendant's/respondent's application dated 18 December 1996 ('the said application') and ordered that the 2nd plaintiff/appellant be struck out as a party.

From the record of appeal, the statement of claim was filed on 5 August 1996. The defence was dated 2 November 1996. And the reply was filed on 14 November 1996. The said application was filed on 18 December 1996. It is supported by the affidavit of Abdul Razak bin Haji Awang Bini affirmed on 13 December 1996. The relevant parts reads as follows:

1. I am the Secretary of the defendant and I am duly authorised to affirm this said affidavit.

2. The only party to this action is the (1st Defendant). The contract of agreement dated the 27th March, 1995 was between the 1st Plaintiff and the Defendant. There is no privity of contract between the Defendant and the 2nd Plaintiff. (A copy of the agreement is annexed hereto and marked "AR1").

3. The 2nd Plaintiff was not a duly nominated sub-contractor under the agreement of the 27th March, 1995 nor was there consent given by the Defendant to sublet or sub-contract to sublet the contract or the said works by the 1st Plaintiff to the 2nd Plaintiff.

The affidavit in opposition ("the affidavit in opposition") was affirmed by Peter Dani ak Keyong on 9 January 1997. The relevant parts read as follows:

1. I am the sole proprietor of the 2nd Plaintiff in this action and I am duly authorised to make this Affidavit on behalf of both the 1st and 2nd Plaintiffs. The facts deposed to herein are within my knowledge, information and belief.

2. I refer to the Affidavit of Abdul Razak bin Haji Awang Bini affirmed on the 13th day of December, 1996 in support of the Defendant's Notice of Application dated the 18th day of December, 1996 and filed herein (hereinafter referred to as the Defendant's Affidavit).

3. I refer to Paragraphs 2 and 3 of the Defendant's Affidavit and say that the 2nd Plaintiff was the sub-contractor of the 1st Plaintiff and that the Defendant has knowledge of and consented to the 2nd Plaintiff being appointed or nominated as the sub-contractor of the 1st Plaintiff. Now produced and shown to me marked "A" is a copy of the Notice of Meeting dated the 17th day of August, 1995 addressed to, *inter alia*, the 1st Plaintiff and the 2nd Plaintiff as sub-contractor. Also produced and shown to me marked "B" is a copy of another Notice of Meeting dated the 11th day of January, 1996 addressed to, *inter alia*, the 1st Plaintiff and myself.

4. I have also written to the Defendant on a number of occasions in my capacity as sub-contractor of the 1st Plaintiff. No objection was ever raised by the Defendant to my appointment or nomination as the sub-contractor

of the 1st Plaintiff. Now produced and shown to me marked "C" is a copy each of my letter dated the 3rd day of July, 1995, 24th day of July, 1995, 30th day of September, 1995, 2nd day of October, 1995 and 15th day of November, 1995.

5. The allegations contained in paragraph 4 of the Defendant's Affidavit are denied. I have instructed firstly Messrs. Hii & Co. Advocates to demand payment by the Defendant of the sum due and owing to the Plaintiffs but there was no response from the Defendants.

6. Subsequently, I instructed Messrs. Hii & Hii, Advocates to give a final reminder and again there was no response or reply by the Defendant until after I instructed Messrs. Hii & Hii, Advocates to commence the present action against the Defendant when the Defendant through their Advocates namely Messrs. Battenberg & Talma, Advocates offered to settle the claim of the Plaintiffs by their letter dated the 22nd day of August, 1996. Now produced and shown to me marked "D" is a copy each of the said letter by Messrs. Hii & Co., Advocates dated the 18th day of December, 1995 and the final reminder by Messrs. Hii & Hii, Advocates dated the 19th day of July, 1996.

The learned counsel for the plaintiffs/appellants in her written submission, *inter alia*, submitted that perusing the said application and the affidavit of Abdul Razak bin Haji Awang Bini in support of the said application, it is abundantly clear that there is only one ground upon which the defendant's/respondent's application was made to strike out the 2nd plaintiff/appellant on the ground that the 2nd plaintiff/appellant was not a party to the action. The learned Sessions Court judge should not have considered that the 2nd plaintiff/appellant was a sole proprietorship and cannot sue in the firm's name as this ground was not pleaded in the defendant's/respondent's statement of defence nor raised in that said application.

In the present case the defendant must be presumed to have waived the irregularity in that he entered an unconditional appearance to the action, made no point of the irregularity in his statement of defence and made no application for the 2nd plaintiff/appellant to be struck out on the ground that the 2nd plaintiff/appellant was a sole proprietorship and cannot sue in the firm's name. In support the case of *Mohamed Mustafa v. Syed Ahmad* [1972] 2 MLJ 241 was cited.

In any event the said application was only made after the pleadings have closed and the plaintiffs/appellants have taken out the notice for directions pursuant to O. 19 dated 22 November 1996 and served the same on the defendant/respondent.

The second ground relied on by the learned Sessions Court judge was that the 2nd plaintiff/appellant was not a party to the agreement dated 27 March 1995 ('the said agreement') which the learned Sessions Court judge held was the basis of the claim in the action.

The claim in the present action is not based solely on the said agreement. In addition to the claim for the contract sum of RM37,000 under the said agreement, the plaintiffs/appellants also claim for:

(a) the sum of RM10,000 for work done and material supplied by the 2nd plaintiff/appellant for the defendant/respondent at the request of the defendant/respondent;

(b) the sum of RM30,000 for loss and damage suffered by the plaintiffs/appellants in stoppage of works on the defendant's/respondent's instruction.

In holding that there was no evidence to show that the 2nd plaintiff/appellant was a duly nominated sub-contractor under the said agreement nor was there consent given by the defendant/respondent to sublet or subcontract the works to the 2nd plaintiff/appellant the learned Sessions Court judge has failed to consider and give effect to paras 3 and 4 of the affidavit in opposition of Peter Dani ak Keyong affirmed on 9 January 1997 and the exhibits annexed thereto which were not denied by the defendant/respondent and thus were deemed to have been admitted by the defendant/respondent.

The learned Sessions Court judge has also failed to consider that there was no affidavit evidence by the person responsible to nominate the sub-contractor namely the engineer to show that the 2nd plaintiff/appellant was not the nominated sub-contractor of the 1st plaintiff/appellant.

In any event the said agreement did not prohibit the subcontracting of works to a sub-contractor.

The present case deals with subcontracting of works and not assignment of contract or subletting of any portion of works. Therefore the learned Sessions Court judge misdirected herself and took irrelevant matters into consideration when she referred to cl. 2 of the said agreement and held that there was no written consent given by the engineer for the assignment of the works from the 1st plaintiff/appellant to the 2nd plaintiff/appellant and that it was fatal that there was no affidavit evidence from the 1st plaintiff/appellant to show that there was any such assignment.

The learned counsel for the defendant/respondent in his written submission, *inter alia,* contended as follows:

In respect of ground 1 of the appeal, it is necessary to consider the legal position of the 2nd plaintiff/appellant. A firm is not a "persona" (see the judgment of Thomson CJ in *Alagappa Chettiar v. Coliseum Cafe* [1962] 28 MLJ 113). The firm name is a mere expression not a legal entity (see judgment of Good JA in *Alagappa Chettiar v. Coliseum Cafe* [1962] 28 MLJ 113 at p. 116). In *Madan Lal & Anor v. Ho Siew Bee* [1982] MLJ 105 it was held that a partnership firm is not a legal persona and cannot be a party to a suit in the court.

Order 10 of the Subordinate Courts Rules 1980 ('the SCR') which permit a firm to sue or be sued in the name of the firm has only application to a partnership of two or more persons and do not apply to a sole proprietorship.

A sole proprietor of a business must sue in his own name (see *Mason v. Mogridge* [1891-92] 8 TLR 805).

It was also submitted that the action commenced in the name of the firm which is a sole proprietorship is not a mere irregularity which can be corrected by amendment. Here the failure was not non-compliance of the SCR which rendered the action irregular (see O. 2 of the SCR). The 2nd plaintiff/appellant was here exercising a right which is not known in law, or asserting a right not possible to enforce in law. It is a nullity and not an irregularity arising from the non-compliance of the SCR. A nullity is not capable of being waived by appearance of the defendant/respondent to the action.

Further since it is a question of law (as opposed to written law – see O. 14 r. 14 of the SCR) it is not appropriate to raise the matter in the pleading which must contain material facts nor in the application to strike out the 2nd plaintiff/ appellant as a party or in the affidavit. The learned Sessions Court judge was right to consider the law in question to strike out the said application.

In the Subordinate Court there is no provision like O. 12 r. 6 of the Rules of the High Court 1980 for entry of unconditional appearance and ground lc(ii) of the appeal is without merit.

In any event the 2nd plaintiff/appellant has never made any application for amendment and there was nothing before the learned Sessions Court judge to consider the merits thereof and exercise its discretion.

In respect of ground 2 of the appeal, it was submitted that this ground is devoid of merit. The plaintiffs'/appellants' claim is based solely on the said agreement. Unless the 2nd plaintiff/appellant can bring himself under the terms

of the said agreement there is no way he could claim the benefits conferred by the said agreement.

There was no evidence that independent of the said agreement the 2nd plaintiff/appellant could claim the sum of RM10,000 as prayed in para. 5 of the statement of claim or the sum of RM30,000 for loss and damages in para. 6 of the statement of claim.

There was no evidence that the defendant/respondent requested from the 2nd plaintiff/appellant for works and material of RM10,000. Paragraph 5 of the statement of claim showed this RM10,000 was for "construction and completion of a parking space at SRK Naman of approximately 8' x 100'." This is in respect of the works carried under the said agreement.

The claim for losses and damages of RM30,000 must also arise from the said agreement.

Since the agreement was between the 1st plaintiff/appellant and the defendant/respondent, the only contractual relationship must be the parties thereto and the 2nd plaintiff/appellant has no claim under the said agreement.

Since the parties have consolidated their intentions into written agreement parol evidence preclude the consideration of other evidence to vary the said written agreement (see ss. 91 and 92 of the Evidence Act 1950).

Clause 20 of the said agreement provides that the 1st plaintiff/appellant "shall not without the written consent of the engineer assign the contract or sublet a portion of the works ... .

There is no evidence that the 1st plaintiff/appellant had nominated the 2nd plaintiff/appellant as his nominee. It is for the 2nd plaintiff/appellant to produce proof of such written consent since the defendant/respondent had deposed in para. 3 of the affidavit of Abdul Razak bin Haji Awang Bini that the 2nd plaintiff/appellant was not the nominated sub-contractor and no consent ever given to sublet or subcontract by the defendant's/respondent's engineer. The Evidence Act 1950 by ss. 101, 102, 103 and 104 provide that the person who makes a positive assertion and wants the court to believe in the said assertion must prove.

Since the 2nd plaintiff/appellant has not proved assignment he has no *locus standi* to take this action in his own name (See *United General Insurance Co. Sdn. Bhd. v. Progress Credit Sdn. Bhd.* [1988] 2 MLJ 297).

The learned counsel for the defendant/respondent in reply stated that no application for amendment was even made prior to the said application or even at the day of hearing of the said application. So the case of *Mohamed Mustafa v. Syed Ahmad* [1972] 2 MLJ 241 is inapplicable to the instant case. Further the issue that a sole proprietorship is a non-legal entity was not argued in *Mohamed Mustafa v. Syed Ahmad (supra).*

The learned counsel for the plaintiffs/appellants in reply submitted that the case of *Mohamed Mustafa v. Syed Ahmad (supra)* is binding on this court. The learned judge at p. 243 stated that the action having been commenced in the name of the firm instead of the proprietor it was a mere irregularity which could be corrected by amendment. The point of law raised must be raised in the pleadings as well as in the application to strike the suit out.

The learned counsel for the plaintiffs/appellants conceded that there is no provision like the RHC for the entry of conditional appearance, the SCR provide for the return day of the summons where the defendant appeared by himself or his counsel and in this case the defendant's counsel appeared on the return day of the summons and disputes the claim only and asked for a certain number of days to file the defence. In other words, it was an unconditional appearance.

The issue of whether there was evidence or not that the defendant/respondent requested from the 2nd plaintiff/appellant for works and materials of RM10,000 is for the trial of this action to decide and not at this interlocutory stage. In both the High Court and the lower court the court can at any time grant an amendment so that the justice of the case will be done. The learned Sessions Court judge did not consider whether an amendment should be appropriate or not. She just dismissed the 2nd plaintiff/appellant as a party.

In *Malaysian Court Practice Subordinate Courts* p. 454 para. 14.13.2 states "only the facts and not the law are to be pleaded: *North-Western Salt Co. Ltd. v. Electrolytic Alkali Co. Ltd.* [1913] 3 KB 422."

I agree with the contention of the learned counsel for the defendant/respondent that the issue of the 2nd plaintiff/appellant being a sole proprietorship is not a legal persona is a point of law. That being the case, it is not mandatory to mention it in the statement of defence. It is also not necessary to state it in the said application. Under the SCR a pleading must state the facts and not the law.

In *Mohamed Mustafa v. Syed Ahmad* [1972] 2 MLJ 241 Gill FJ (as he then was) delivering the judgment of the Federal Court at p. 243 said:

> I do not think there is any merit in this ground of appeal. In my opinion, the learned judge was right in allowing the amendment. This case can be clearly distinguished from the case of *Mason and Son v. Mogridge* (1891-92) 8 TLR 805. This was not an Order 14 application as in that case. In that case no amendment was asked for; here there was an application for an amendment. In that case objection was taken immediately; here no objection was taken until four years after the filing of the action. Here there was a mistake as regards the name of the plaintiff. The action having been commenced in the name of the firm instead of the proprietor, it was a mere irregularity which could be corrected by an amendment under Order 28 and Order 16, rr.2 and 12 of the Rules of the Supreme Court, 1957. "*Bona fide* mistake" in O.16, r. 2 includes a mistake of law as well as of fact (see *Duckett v. Gover* (1877) 6 Ch.D. 82).
>
> The amendment was also rightly allowed on the ground that the defendant must be presumed to have waived the irregularity in that he entered an unconditional appearance to the action, made no point of the irregularity in his statement of defence and made no application for the suit to be struck out until the action came on for trial.

It is clear that in *Mohamed Mustafa* there was an application for amendment and the Federal Court also held that the learned judge was right in allowing the amendment.

However, in the instant appeal there was no formal application to amend the name of the 2nd plaintiff/appellant. So there was no material for the learned Sessions Court judge to decide whether to exercise the discretion to allow the amendment in respect of the name of the 2nd plaintiff/appellant or not.

In the absence of any formal application by the 2nd plaintiff/appellant to amend the name of the 2nd plaintiff/appellant to that of Peter Dani ak. Keyong, the learned Sessions Court judge did not err in not allowing the name of the 2nd plaintiff/appellant to be changed to Peter Dani ak. Keyong.

Order 2 r. 2(1) of the SCR reads as follows:

> An application to set aside for irregularity any proceedings, any step taken in any proceedings or any document, judgment or order therein shall not be allowed unless it is made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

As provided by the rule, the application must be made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity.

In my opinion, the "reasonable time" in O. 2 r. 2(1) of the SCR means a reasonable time after becoming aware of the irregularity.

At the close of the pleadings there was no evidence to indicate that the 2nd plaintiff/appellant is a sole proprietorship. When the said application was filed on 18 December 1996 there was no evidence adduced to show that the 2nd plaintiff/appellant is a sole proprietorship.

In para. 1 of the affidavit in opposition it was averred that "I am the sole proprietor of the 2nd plaintiff in this action and I am duly authorised to make this affidavit on behalf of both the 1st and 2nd plaintiffs."

So it is clear that the evidence that the 2nd plaintiff/appellant is a sole proprietorship only surfaced since 9 January 1997 after the pleadings had been closed. Neither the fact that the defence had been filed nor the fact that pleadings have closed is relevant as that had occurred before the irregularity became apparent.

So I am of the view that the defendant/respondent had taken objection in respect of the irregular proceedings within a reasonable time.

Under the circumstances, I am of the view that the defendant/respondent had not waived the irregularity.

Further, *16 Halsbury's Laws of England,* 4th edn, para. 1515 reads as follows:

> 1515. Estoppel against statute. The doctrine of estoppel cannot be invoked to render valid a transaction which the legislature has, on grounds of general public policy, enacted is to be invalid, or to give the court a jurisdiction which is denied to it by statute, or to oust the court's statutory jurisdiction under an enactment which precludes the parties contracting out of its provisions.

For this purpose the SCR is clearly a subsidiary legislation within the meaning of s. 3 of the Interpretation Act 1967 and has statutory force.

Order 10 r. 1 of the SCR reads as follows:

> Subject to the provisions of any written law any two or more persons claiming to be entitled, or alleged to be liable, as partners in respect of a cause of action and carrying on business within the jurisdiction may sue, or be sued, in the name of the firm (if any) of which they were partners at the time when the cause of action accrued.

A partnership firm is not a legal entity in law (see *Alagappa Chettiar v. Coliseum Cafe* [1962] 28 MLJ 113).

In *Mallal's Supreme Court Practice* (2nd edn) p. 1078 para. 77/1/6 states as follows:

> Sole proprietor: A person trading by himself as a firm, must sue in his own name, though he may be sued in his trading name. *Mason v. Mogridge* (1892) 8 T.L.R. 805.

Accordingly, I am of the view that the defendant/respondent is not estopped from raising the issue that the 2nd plaintiff/appellant which is a sole proprietorship cannot sue in the name of the firm.

As such, I am of the view that the learned Sessions Court judge was correct when at p. 16 of the supplementary appeal record she said "Having considered the authorities cited, I uphold learned counsel for the defendant's submission on 1st ground, the 2nd plaintiff being a sole proprietorship cannot sue in the firm's name and thus the 2nd plaintiff is struck out as a party to this action."

The relevant part of cl. 20 of the said agreement reads as follows:

> The Contractor shall not without the written consent of the Engineer assign this contract or sub-let any portion of the works; provided that such consent shall not be unreasonably withheld to the prejudice of the Contractor.

In para. 3 of the affidavit of Abdul Razak bin Haji Awang Bini it is averred that "the 2nd plaintiff was not a duly nominated sub-contractor under the agreement of 27 March 1995 nor was there consent given by the defendant to sublet or sub-contract to sub-let the contract or the said works by the 1st plaintiff to the 2nd plaintiff.

In para. 3 of the affidavit in opposition it is averred that "the 2nd plaintiff was the sub-contractor of the 1st plaintiff and that the defendant has knowledge of and consented to the 2nd plaintiff being appointed or nominated as the sub-contractor of the 1st plaintiff." However, the 2nd plaintiff/appellant has not adduced any evidence to show that a written consent of the engineer has been obtained pursuant to cl. 20 for the 1st plaintiff to assign the contract or sublet any portion of the work to the 2nd plaintiff.

The 2nd plaintiff/appellant has not adduced evidence that the 2nd plaintiff/appellant was a duly nominated sub-contractor under the said agreement.

The documents marked "A", "B" and "C" referred to in paras. 3 and 4 of the affidavit in opposition do not show that there was written consent pursuant to cl. 20. Neither do the documents show that the 2nd plaintiff was a duly nominated subcontractor under the said agreement.

Paragraph 5 of the statement of claim reads as follows:

> 5. The Plaintiffs further claim against the Defendant for the sum of RM10,000.00 being due from the Defendant to the Plaintiffs for work done and material supplied by the 2nd Plaintiff for the Defendant at the Defendant's request.
>
> **Particulars**
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> | | |
> |---|---|
> | Construction and completion of a parking space at SRK Naman of approximately 8' x 100' | RM10,000.00 |

In p. 35 of the appeal record, there is a document referred as "section two improvement method" and the last paragraph reads as follows:

> The successful tenderers will trim down seven (7) hills to six (6) feet and below, to straighten a section of the existing winding road which is approximately 700 linear feet and to construct a parking space at SRK Naman (20' 0" x 40' 0") approximately.

So it is clear that para. 5 of the statement of claim is based on the said agreement. Further, no evidence was adduced that the defendant/respondent requested from the 2nd plaintiff/appellant for works done and material supplied in the sum of RM10,000.

Further, as the 2nd plaintiff/appellant has not proved that there was assignment, the 2nd plaintiff/appellant has no right to commence this action in the 2nd plaintiff's/appellant's name. (See *United General Insurance Co. Sdn. Bhd. v. Progress Credit Sdn. Bhd.* [1988] 2 MLJ 297);

From the evidence adduced it is clear that the 2nd plaintiff/appellant is not a party to the said contract. So the learned Sessions Court judge did not err when at p. 17 of the supplementary record of appeal she said "As the 2nd plaintiff is not a party to the contract which is the basis of the claim in this action, I allow the defendant's application and order that the 2nd plaintiff be struck out as party in this action ..."

In view of the foregoing, I dismiss the appeal with costs to be taxed unless agreed.